No. 132, ORIGINAL

In the
Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Exceptions to the Preliminary Report and the Second Report of the Special Master

EXCEPTIONS OF THE STATE OF NORTH CAROLINA TO THE REPORTS OF THE SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

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June 2009

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EXCEPTIONS TO THE PRELIMINARY REPORT AND THE SECOND REPORT OF THE SPECIAL MASTER

The State of North Carolina, takes exception to the following conclusions of the Special Master:

1. The recommended denial of North Carolina's motion to dismiss all claims brought by plaintiff Southeast Interstate Low-Level Radioactive Waste Management Commission. Under both the Eleventh Amendment and common-law sovereign immunity principles, only the United States or a sister State may sue a non-consenting State in federal court, absent a valid congressional abrogation of the State's sovereign immunity. Because North Carolina has not waived, and Congress has not abrogated, North Carolina's sovereign immunity from suit by the Commission, the Commission's claims cannot proceed in this Court. In this case, this Court has jurisdiction only over the claims asserted by the plaintiff States. Contrary to the Special Master's recommendation, North Carolina's motion to dismiss the Commission's claims should be granted.

2. The failure to recommend granting North Carolina's motion for summary judgment on the quasi-contract claims asserted in Counts III, IV, and V of the Bill of Complaint. It is a settled common-law rule that where the parties' relationship concerning a given subject matter is governed by the terms of an express contract, no equitable claim will lie in addition a claim for breach of contract. The Special Master declined to address North Carolina's motion at this stage in the proceedings, but the motion is legally and factually ripe for adjudication, and should be granted.

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INTRODUCTION

Pursuant to an agreement with other States memorialized in a formal interstate Compact approved by Congress, North Carolina tried unsuccessfully to site and license a facility within the State for the disposal of low-level radioactive waste. North Carolina spent over $30 million of its own taxpayers' money in its lengthy effort to conduct the proper environmental studies and obtain the necessary approvals for the facility. None of the other States spent any money of their own to assist North Carolina's efforts. However, over time North Carolina did receive financial assistance from fees and surcharges collected from private waste generators by the Commission established to oversee operation of the Compact. That financial assistance amounted to almost $80 million. After years of development efforts, however, the Commission declined to provide further funding, and North Carolina determined that its taxpayers could not alone bear the enormous costs still remaining to study and develop the site. Threatened with punitive sanctions by the Commission, North Carolina exercised its explicit, unambiguous right to withdraw from the Compact.

The Commission and several (but not all) of the member States to the Compact have now sued North Carolina under the original jurisdiction of this Court. They allege that North Carolina breached its obligations under the Compact by failing to construct a facility before withdrawing from the Compact, and they seek (a) return to the Commission of the private generator surcharge and fee funds provided to North Carolina over the years to assist in site development, and (b) whatever damages the States themselves

suffered as a result of North Carolina's failure ultimately to construct a regional disposal facility. But as the Special Master determined, the undisputed record establishes that North Carolina engaged in appropriate, good-faith efforts to site, license, and develop a facility while it was a member of the Compact. The Compact requires no more. North Carolina could have exercised its contractual right to withdraw at any time, but instead chose to spend millions of dollars in its efforts - albeit ultimately futile - to achieve the Compact's objective. The fact that the Commission chose, for its own reasons, to provide financial assistance derived from private-generator fees and surcharges has nothing to do with the question whether North Carolina fulfilled the obligations of a designated host state while it was a member of the Compact - not an obligation to construct a facility, but an obligation to *try* in good faith to construct a facility. This it did, and there is no evidence to the contrary. There is therefore no breach of the Compact, as the Special Master correctly determined.

The Special Master's erred in declining to go further and recommend a complete judgment in North Carolina's favor in this action. Contrary to the Special Master's reports, this Court lacks jurisdiction over the claims of the plaintiff Commission, because under the Eleventh Amendment and common-law sovereign immunity principles, a non-consenting State may be sued in this Court only by the United States or a sister State, and the Commission is neither. And while the Special Master correctly determined that North Carolina is entitled to judgment on the two contract-

based counts, he should have also recommended judgment for North Carolina on the remaining, quasi-contract claims, because such claims cannot be asserted as a matter of law where, as here, an express contract already governs the parties' relationship.

STATEMENT

A. The Party States And Congress Enact The Compact.

The Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact") was enacted by each of the eight original member states and consented to by the United States Congress on January 15, 1986 in the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act. Pub. L. No. 99-240, Title II, 99 Stat. 1859 (1986).[1] The Act provides congressional consent to seven separate regional compacts involving a total of 44 states. None of these contemporaneously-enacted compacts has resulted in the creation of an operational low-level radioactive waste disposal facility.

North Carolina joined the Compact as a party state pursuant to a statute enacted in 1983 by the North Carolina General Assembly. N.C. Gen. Stat. § 104F-1

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[1] The original party states were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina Tennessee and Virginia. South Carolina withdrew from the Compact in 1995. North Carolina withdrew in 1999. (A copy of the Compact as amended is attached hereto as Appendix 1a - 28a.)

(repealed effective July 22, 1999). The Compact declared its policy to establish the instrument and framework for a cooperative effort to provide sufficient facilities for the proper management of low-level radioactive waste generated in the region, while distributing the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states. Compact, Article 1.

The Compact created the Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission") and provided it with specific duties and powers to carry out the purposes of the Compact. Compact, Article 4. The Commission is composed of two voting members appointed by each party state. Compact, Article 4(A). A primary duty of the Commission was the identification of a host state for development of a second regional disposal facility and to "ensure that such facility is licensed and ready to operate as soon as required but in no event later than 1991." Compact, Article 4(E)6. The Compact declared that the pre-existing facility located in Barnwell, South Carolina was not to serve as the regional disposal facility beyond December 31, 1992. Compact, Article 2(10).

The Compact expressly provided that each party state retained all elements of its sovereignty and that nothing in the Compact would be construed to "infringe upon, limit or abridge those rights." Compact, Article 3. The party states further agreed that nothing in the Compact would serve to "[a]lter the relations between, and the respective internal responsibilities of, the government of a party state and

its subdivisions" or "[a]ffect the rights and powers of any party state and its political subdivisions to regulate and license any facility within its borders." Compact, Article 6(A)7., 9.

The Commission selected North Carolina as the second host state in September 1986. In response, the North Carolina General Assembly enacted legislation in August 1987 creating the Low-Level Radioactive Waste Management Authority (the "Authority") for the purpose of fulfilling its responsibilities under federal law and the Compact, while protecting public health, safety and the environment. N.C. Gen. Stat. § 104G (repealed effective July 1, 2000). North Carolina also initiated the enactment of an amendment to the Compact altering the parties' withdrawal rights. The original withdrawal clause provided that "any party state may withdraw" from the Compact so long as any regional disposal facility already located within the state remained available to the region for four years after withdrawal. Compact, Article 7(G). The North Carolina statute establishing its Authority provided that North Carolina would exercise its right to withdraw from the Compact unless every party state agreed to, and Congress approved, an amendment to that provision terminating the right of a party state to withdraw from the Compact thirty days following the commencement of operation of the second host state disposal facility. 1987 N.C. Session Laws Chapter 850, section 25. The other party states agreed, and in 1989 Congress approved the amendment adding the withdrawal limitation in a new Article 7(H). *See Southeast Interstate Low-Level Radioactive Waste*

Compact Amendments Consent Act of 1989, Pub. L. No. 101-171, 103 Stat. 1289 (1989).

B. North Carolina Attempts To Site And License A Facility.

Pursuant to North Carolina's designation as host state, the Authority initiated the complex, expensive, and lengthy process of engaging consultants and contractors necessary to move forward with site selection, licensing, and eventual construction of a disposal facility. In 1989, the Authority's consultants and contractors reviewed 21 potential sites, resulting in the identification of four favorable locations. In 1990, further investigation narrowed the possibilities to two sites - one in Richmond County and another located along the Wake/Chatham county line. But both Richmond and Chatham Counties immediately filed lawsuits to enjoin any potential facility development in those locations. Those actions, including appeals, proceeded for more than three years. In November 1993 the North Carolina Supreme Court ruled that the trial courts in those counties could not preliminarily enjoin the Authority's site selection process. *See Richmond County v. North Carolina Low Level Radioactive Waste Mgmt. Auth.*, 436 S.E.2d 113 (N.C. 1993). Additionally, the State of South Carolina enacted legislation in 1992 requiring that the Barnwell facility be closed to North Carolina generators if North Carolina selected the Richmond County site. S.C. Code Regs. 48-48-80 (amended effective June 16, 1992).

In December 1993 the Authority identified the Wake County site as the preferred site. Soon thereafter, the Authority's primary contractor, Chem-Nuclear Systems, Inc. ("Chem-Nuclear"), submitted an application to the State's licensing authority, the Division of Radiation Protection in the Department of Environment, Health, and Natural Resources ("DRP"). Def. App. 159a. DRP is the designated state entity responsible for administration of North Carolina's radiation protection program, with specific responsibility for the process of licensing low-level radioactive waste facilities. N.C. Gen. Stat. § 104E (1999). DRP's rigorous review of the license application resulted in an initial submission of 38 interrogatories to Chem-Nuclear in March 1994 designed to clarify concerns about the complex geology and hydrology of the site, as well as various modeling and monitoring issues that had already been raised informally. Def. App. 160a. Ultimately, DRP submitted 594 interrogatories to Chem-Nuclear concerning identifying major health and safety issues that required resolution prior to the licensing of the proposed Wake County site. Def. App. 160a.

In July 1994 DRP issued a revised schedule estimating that the license review and approval process would not be completed until June 1996. Pl. App. 160-68. In January 1995 the Authority informed the Commission that field tests and design work calculations necessary to respond to DRP's interrogatories would take additional time, meaning that the potential license issuance date would be the summer of 1997, and that the facility could not be open until 1998. Pl. App. 169-75.

In January 1996 Chem-Nuclear issued a comprehensive site assessment plan acknowledging deficiencies during the testing and review process and, in turn, the Authority issued a "Licensing Work Plan" on May 31, 1996 which included a series of "Decision Points" with a targeted date for the completion of the licensing review process and a licensing decision in early 2000. Joint Supp. Fact Br. App. 67-134. In July 1997, however, DRP reported that a new geologic discovery of groundwater discharge at the site would materially affect license approval by requiring the facility to be reconfigured from existing plans. Def. App. 165a. By November 1997 the Authority believed it had satisfied the criteria specified in Decision Point 1 and could continue with site development. Def. App. 16a. The Commission, however, shortly thereafter announced that it would no longer provide financial assistance to support the Authority's site development efforts.

C. Commission Funding Assistance Is Recognized By All As Necessary From The Outset.

The Compact provides for the Commission to receive operational funding, consisting of an initial $25,000 payment made by each party state, together with revenues resulting from special fees or surcharges levied by the host state on users disposing waste at a regional facility. Compact, Article 4(H). The pre-existing licensed disposal facility located in Barnwell County, South Carolina was subject to the Commission's authority for the imposition of such fees and surcharges. Compact, Article 2(10); 7(H).

Responsibility for funding the development of a second disposal facility is not explicitly addressed in the Compact. Article 4 does make clear the Commission itself is not *required* by the Compact to provide the funding: the "Commission shall not be responsible for any costs associated with ... the creation of any facility." Compact, Article 4(K). But neither does the Compact obligate the host state to construct a facility *no matter the cost*. Rather, Article 5(C), the Compact provision addressing development and operation of facilities, provides only that "[e]ach party state designated as a host state for a regional facility shall take *appropriate steps* to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority" (emphasis added).

The provision of funding to pay for the Authority's efforts to site and license a North Carolina facility was a critical issue from the very outset of the process. In a Resolution adopted February 9, 1988, the Commission determined that it would be "appropriate and necessary" to provide financial assistance to "any state" developing the second disposal facility. Pl. App. 63. The Commission thus authorized the use of its "State Assistance Trust Fund" for "the initial planning and administrative costs and other pre-operational costs associated with [North Carolina's] obligation to create and operate a regional facility." *Id.* Throughout the next decade, the Commission raised substantial revenue by imposing and collecting various surcharges and fees on waste generators utilizing the Barnwell disposal facility in South Carolina, and used those revenues to defray a substantial portion of the

costs associated with North Carolina's efforts to site and license a disposal facility.

For instance, in 1989 the Commission instituted a "Capacity Assurance Charge" on all southeast waste generators using the Barnwell facility for the purpose of creating funds "to support the licensing phase of North Carolina's site development." Pl. App. 71.[2] In September 1992 the Commission established an out-of-region access fee on waste disposed of at the Barnwell facility. Pl. App. 123-42. Subsequently, the Commission found that it "must take appropriate action to furnish additional funds for use" by the Authority in support of the licensing phase of site development and, in November 1992, established an access fee on regional waste "at a rate sufficient to raise $3 million per quarter for a total of $36 million over the three year period, January 1, 1993 - December 31, 1995." Def. App. 87a.

The member States did not provide any of the funds distributed by the Commission to North Carolina. The surcharges and fees paid by waste generators using the Barnwell disposal facility in South Carolina were the source of all monies provided by the Commission to North Carolina for use in the facility licensing process. Def. App. 153a. From 1988 through 1998, the Commission provided North

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[2] Information available at that time indicated that "[t]he total of all projected expenditures from the first anticipated date of receiving Capacity Assurance funds in April 1990, through the receipt of the license on December 31, 1991 is approximately $21,000,000." Pl. App. 74.

Carolina with approximately $80 million in such assistance, while North Carolina expended approximately $34 million of its own funds in its efforts to site and license a disposal facility. Joint Supp. Fact Br. 1-2.

D. South Carolina Withdraws From The Compact And Removes The Commission's Funding Source.

The Commission's practice of providing North Carolina financial assistance from fees and surcharges collected from private generators at the Barnwell facility continued without interruption until July 1995. At that time South Carolina withdrew from the Compact and closed the Barnwell facility to generators from North Carolina.[3] As a result of South Carolina's withdrawal from the Compact, the Commission lost the use of the Barnwell disposal facility as a means of generating revenue. Accordingly, on January 5, 1996, the Commission notified North Carolina that future funds would not be available to assist in the development of the second regional disposal facility. Joint Supp. Fact Br. App. 1-3.

In response, North Carolina Governor James B. Hunt advised the Commission that the Compact agreement contemplated an equitable distribution of

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[3] Effective July 1, 2000, South Carolina joined the Atlantic Interstate Low-level Radioactive Waste Compact and repealed the ban on low-level radioactive waste shipments to the Barnwell disposal facility from generators located in North Carolina.

costs and reminded its Chairman that North Carolina had already contributed $30 million of state funds for the facility, while none of the other party states had directly provided any money beyond their original $25,000 contribution. Joint Supp. Fact Br. App. 11-12. On June 14, 1996, Governor Hunt informed the Commission that while "North Carolina shares an interest with the Commission and the other party states" in seeing that a regional disposal facility was licensed, "North Carolina is not prepared to assume a greater portion of the project costs" than it had done to date. Joint Supp. Fact Br. App. 17-18.

In October 1996 the Commission adopted a Resolution declaring that it was "willing and able to provide funds to support site development in North Carolina" (Pl. App. 240), and thereafter did provide funds in 1996 and 1997 for the implementation of the Licensing Work Plan, allowing North Carolina to continue its progression toward a licensing decision. *See* Oct. 3, 1996 Minutes, Southeast Compact Commission (Pl. App. 247-52); Apr. 18, 1997 Minutes, Southeast Compact Commission (Pl. App. 269-74); Aug. 21, 1997 Minutes, Southeast Compact Commission (Pl. App. 281-88).

In December 1996 the Authority promulgated a business plan to define future financial needs and potential options for satisfying such needs, estimating that an additional $34 million was needed to reach the point at which a license could be issued and assuming that $7 million of that requirement would be funded by North Carolina. Joint Supp. Fact Br. App. 135-48. Subsequently, in August 1997 the Commission

"agree[d] in principle" with a Memorandum of Understanding drafted by a regional electric utility generators group, and requested that North Carolina consider the proposed MOU "as a mechanism to address" license funding shortfalls and construction funding. Pl. App. 284. On November 3, 1997, North Carolina's Governor responded to the proposed MOU, which contemplated a loan from the utilities group of up to $7 million to the Authority in exchange for preferential rates and the ability to export waste out of the compact region, by conveying his conclusion that it was "doubtful that the practical, as well as legal, commitments envisioned would be approved by all the affected agencies and governmental bodies." Joint Supp. Fact Br. App. 43-44.

F. The Commission Terminates Funding And North Carolina Withdraws from the Compact.

On December 1, 1997, the Commission informed the Authority that it was terminating future funding assistance for the project. Joint Supp. Fact Br. App. 49. The Commission had end-of-year cash balances exceeding $22 million in fiscal years 1997, 1998, and 1999. Pl. App. 208-09. The Authority responded to the funding cut off by indicating that the Commission's action left "no alternative but to commence the orderly shutdown of the project." Joint Supp. Fact Br. App. 53.

North Carolina continued to fund the Authority in 1998 and 1999, taking steps to protect the proposed site and to preserve the work that had been performed

up to that point, in the hope that the project could pick up where it left off upon the resumption of funding by the Commission. Miller Aff. ¶4, Def. Supp. App. 131; 133. In 1998 the Commission reiterated the importance of reaching a mutual resolution of the funding issue and expressly promised "to work with the Authority to develop a plan to share the cost for site development." Joint Supp. Fact Br. App. 55. North Carolina participated in a mediation with the Commission in the hopes of reaching an agreement regarding funding that would allow the licensing process to go forward. Answer to Complaint ¶47.

The mediation and other efforts failed to resolve the funding impasse. North Carolina thus determined to exercise its unconditional right of withdrawal pursuant to Article 7(G) of the Compact. On July 26, 1999, the General Assembly enacted legislation withdrawing North Carolina from membership as a party state and repealing its prior enactment of the Compact. 1999 N.C. Sess. Laws 357.

G. The Commission Holds A Sanctions Hearing.

In August 1999 the Commission voted to initiate the sanctions procedure established by Article 7(F) of the Compact. Answer to Bill of Complaint ¶51. In November 1999 the Commission notified North Carolina that a "formal, quasi-judicial sanctions hearing" would be held on December 8, 1999, and that the Commission would decide on December 9 "whether North Carolina violated the compact law" and determine an appropriate sanction for such violation. Pl. App. 331. North Carolina's Attorney General

responded that the Commission had no jurisdiction over North Carolina subsequent to the State's withdrawal from the Compact and that North Carolina would not participate in the sanctions proceeding. Pl. App. 339-40.

Pursuant to the Compact procedure, a Sanctions Complaint was brought by Compact members Florida and Tennessee and was signed by four voting members of the Commission. Pl. App. 327. Three of the voting members of the Commission - the same members who would be adjudicating the Complaint - testified against North Carolina during the hearing. Def. Supp. App. 68-105. And all Commission members were already on record concerning the issue purportedly to be decided at the "hearing," by virtue of the April 21, 1999, adoption of a Resolution declaring the Commission's belief "that the State of North Carolina currently stands in violation of the compact law." Pl. App. 324. No member of the Commission recused himself or herself from the vote on the Sanctions Complaint, which passed unanimously in a roll call vote on December 9, 1999. Pl. App. 403-04.

The Commission's Sanctions Resolution demanded that North Carolina pay to the Commission:

- $79,930,337 (identified as the amount of funds provided by the Commission for the development of a waste disposal facility), plus interest;

- an additional $10 million for the loss of future disposal surcharges that would have funded the

Commission's operating budget for a period of twenty years; and

- the Commission's attorney's fees.

Pl. App. 410-12. North Carolina declined to make the payment.

H. Motions for Leave to File Bill of Complaint.

On July 10, 2000, the Commission sought leave from this Court to file a Bill of Complaint under this Court's original jurisdiction, seeking summary enforcement of the sanctions order. *See Southeast Interstate Low-Level Radioactive Waste Mgmt. Comm'n v. North Carolina, No. 131, Orig.* The Court requested the views of the Solicitor General, who argued in response that leave to file should be denied because "[t]he Commission itself is plainly not a State," and "therefore cannot satisfy the fundamental prerequisite for invoking this Court's exclusive jurisdiction." U.S. Br., No. 131, Orig., 8. Further, the Solicitor General agreed with North Carolina that "suit by a Compact Clause entity against a State would appear to raise a question under the Eleventh Amendment." U.S. Br., No. 131, Orig., 13. The Solicitor General emphasized that the Commission was not suing in a representative capacity on behalf of the States, but instead in its own right as a legal entity separate and distinct from the party states, asserting its own distinct legal rights:

> The Commission is not suing North Carolina to recoup funds that are owed to the other party States. Indeed, the

> Commission - and not the States that are parties to the Compact - dispersed the funds to North Carolina in the first place. In accordance with the Compact, the Commission itself generated virtually all of those funds through the assessment of fees on users of the regional waste disposal facility.

U.S. Br., No. 131, Orig., 17. Notably, the Commission agreed with the Solicitor General's premise, specifically contending that "*only the Commission itself can sue to enforce the sanction against North Carolina, and collect the $90 million (plus interest) that is owed to it.*" Supp. Br. in Response to the Br. of the Solicitor General, No. 131, Original, 6 (emphasis added). The States themselves, by contrast, "could sue *only to recoup their out-of-pocket costs*, a small fraction of the total funds that North Carolina received from the Commission, which were generated from fees levied by the Commission on users of the South Carolina waste facility." *Id.* (emphasis added).

This Court denied the motion for leave to file on June 25, 2001. 533 U.S. 926 (2001).

On June 3, 2002 - almost a full year later - the Commission moved again for leave to file a bill of complaint, this time joined by four of the party states as additional plaintiffs. The Court again called for the views of the Solicitor General, who recommended that the motion be granted, because of the presence of States as plaintiffs seeking "relief that would redound to their own benefit." U.S. Br., No. 132, Orig., 11. The

Solicitor General suggested that the Court "focus the litigation on two controlling issues and facilitate the ultimate resolution of the controversy" by inviting cross-motions for partial summary judgment on two questions: (1) whether the Compact empowers the Commission to impose a monetary sanction, and (2) if so, whether the Commission has authority to impose that sanction on a State that has withdrawn as a member of the Compact. *Id.* at 17-18.

This Court granted the motion for leave file on June 16, 2003. 539 U.S. 925 (2003). North Carolina filed its Answer to the Bill of Complaint, along with a Motion to Dismiss the claims of the Commission on Eleventh Amendment and sovereign immunity grounds, on August 15, 2003. On November 17, 2003, this Court appointed Bradford R. Clark as Special Master in the case. 540 U.S. 1040 (2003).

I. Proceedings Before The Special Master.

In March 2004, plaintiffs moved for summary judgment on Count I of the Bill of Complaint, essentially seeking summary enforcement of the Commission's sanctions order. North Carolina moved to dismiss the entire complaint for failure to state a claim. The Solicitor General filed a brief agreeing with North Carolina that Count I should be dismissed, but agreeing with the plaintiffs that the remaining counts should proceed to discovery. The motions were argued orally in September 2004.

1. *The Preliminary Report of the Special Master*.

The Special Master addressed the pending motions in a Preliminary Report issued in June 2006.

The Special Master first recommended denial of North Carolina's motion to dismiss the Commission's claims on Eleventh Amendment and sovereign immunity grounds. A non-State party may participate in an original action, the Special Master concluded, "so long as the non-State party asserts the same claims and seeks the same relief as the other plaintiffs." Prelim. Report 6. At the pleading stage of the proceedings, the Special Master continued, it was not sufficiently clear whether the Commission's claim for restitution of the $80 million it provided to North Carolina was "separate and distinct" from the claims asserted by the States on their own behalf. Prelim. Report 10. The Special Master also recommended denial of North Carolina's motion to dismiss the remaining contract and quasi-contract claims. The pleading stage was, again, too early to determine "whether North Carolina in fact breached its obligations under the Compact." *Id.* at 40. The Special Master also speculated that discovery might show that North Carolina and the Commission "entered into a[] supplemental agreement outside the four corners of the Compact" (Prelim. Report 41), although the complaint included no such allegation.

While thus allowing plaintiffs contract and quasi-contract claims to proceed, the Special Master agreed with North Carolina and the Solicitor General that Count I, seeking summary enforcement of the Sanctions Order, should be dismissed on two distinct grounds: (1) "the Compact does not authorize the

Commission to impose monetary sanctions against member States," and (2) "North Carolina withdrew from the Compact prior to the imposition of sanctions." *Id.* at 15; *see id.* at 42.

2. *The Second Report of the Special Master*.

Following the issuance of the Preliminary Report, the parties conducted substantial written and oral discovery. Pursuant to a stipulated motions schedule and structure, in September 2007 plaintiffs moved for summary judgment on Count II of the complaint (breach of contract), and North Carolina moved for summary judgment on all claims. Following briefing and argument, the Special Master sought supplemental briefing on certain specific questions, and ultimately filed his Second Report in April 2009.

The Second Report recommends that North Carolina be granted summary judgment on Count II because the record facts establish that "North Carolina did not breach its obligation to take 'appropriate steps' under the Compact." Second Report 20; *see id.* at 35. The Special Master rejected plaintiffs' contention that the Compact imposed "an absolute obligation on the host State to build a facility," finding instead that North Carolina's obligation was "more akin to a promise to use reasonable efforts than a promise to build a facility no matter what the cost." *Id.* at 20-21. The undisputed facts showed that "North Carolina worked consistently to site and license a facility," and that the parties understood from the outset that it would be prohibitively expensive for North Carolina to develop the facility with no outside assistance. *Id.* at

35. Accordingly, "North Carolina's decision to withdraw from the Compact did not constitute a breach of contract" when the Commission terminated all funding assistance. *Id.* at 36. The Special Master also determined that there clearly was no supplemental agreement between North Carolina and the Commission that would have limited the right to withdraw in exchange for financial assistance - indeed, plaintiffs did not even contend that such a distinct agreement existed. Instead, "the Commission provided assistance merely to facilitate North Carolina's performance under the Compact and neither requested nor expected any additional performance." *Id.* at 21.

Finally, having recommended judgment in North Carolina's favor on the summary sanctions enforcement (Count I) and breach of Compact (Count II) claims, the Special Master determined that he would "defer consideration" of North Carolina's motion for summary judgment on the remaining quasi-contract claims (Counts III, IV, and V), because there were, in his view, "legal and factual questions" requiring further briefing and argument and possibly discovery. *Id.* at 45. While recognizing that it "is undisputed that the Commission, rather than the party States themselves," provided North Carolina with financial assistance, and declaring that the quasi-contract, restitution-type claims asserted in Counts III, IV, and V "appear to belong exclusively to the Commission, since it provided the funds at issue," the Special Master hypothesized that it might be "possible that the Plaintiff States may sue *parens patriae* to restore the funds to the Commission." *Id.* at 42.

The Special Master subsequently submitted the Preliminary Report and Second Report, which this Court received and ordered filed on April 27, 2009, subject to the filing of exceptions by the parties.

SUMMARY OF ARGUMENT

I. The Special Master erred in recommending denial of North Carolina's motion to dismiss the claims brought by the Commission. Under both the Eleventh Amendment and common-law sovereign immunity principles, only the United States or a sister State may sue a non-consenting State under this Court's original jurisdiction, absent a valid congressional abrogation of the State's sovereign immunity. Because North Carolina's sovereign immunity from suit by the Commission has not been waived or abrogated, the Commission's claims cannot proceed in this Court.

The Special Master's reports conclude that the Commission's claims may proceed unless and until it is established that the Commission is asserting different claims, seeking differing relief, from the claims asserted by the plaintiff States. To the extent the Commission asserts claims that are not or cannot be asserted by the States, the reports explain, North Carolina is entitled to assert its sovereign immunity from such claims. But at this stage in the proceedings, the Second Report concludes, it remains unclear whether the Commission's claims differ from those of the plaintiff States. The Special Master's analysis errs in two respects.

A. First, in recommending that the Commission's claims be allowed to proceed so long as they are identical to claims being asserted by the plaintiff States, the Special Master's reports rely incorrectly on precedents of this Court allowing Indian tribes and private parties to intervene as parties in actions against States brought by the United States. Those precedents are not clearly or consistently reasoned, but their basic theory is that once this Court's jurisdiction is already properly invoked by a party against whom the State cannot assert sovereign immunity, there is no impermissible enlargement of this Court's jurisdiction if other parties are allowed to piggy-back on the proper claims by asserting identical claims. That theory cannot be reconciled with subsequent decisions of this Court confirming that sovereign immunity is not solely about the limits of this Court's jurisdiction, but is a personal privilege of each State, fundamental to its sovereignty, to decide when, where, and by whom it can be sued (absent a valid congressional abrogation). Because North Carolina has not consented to suit by the Commission in this Court, the Commission's claims cannot proceed.

B. Second, even on the theory of the cases cited by the Special Master, North Carolina is immune from the Commission's claims. Those cases tacitly recognize that the claims of a non-State, non-federal party cannot proceed against a non-consenting State when they are distinct from claims that are otherwise properly asserted against the State. Such claims go beyond what the cases deem to be the permissible jurisdiction of the federal court over the non-consenting State. Although the Special Master's

reports correctly recognize the limiting principle of the cases, the Second Report errs in concluding that it cannot yet be determined whether the Commission's claims for recovery of the $80 million in financial assistance it provided to North Carolina are the same as the claims asserted by the States. In fact, on the undisputed summary judgment record, it is clear as a matter of law and fact that *only* the Commission has any legal claims, in theory, to restitution of the $80 million.

It is black-letter law that restitution may be sought only by the party who provided the benefit, and here it is undisputed that the Commission used its own funds when it provided financial assistance to North Carolina. The Compact makes clear that the Commission is its own legal entity distinct from the States and that its actions are controlled by a majority vote of individual Commissioners. The funds provided to North Carolina were raised by the Commission through the imposition of fees and surcharges directly on private generators. The plaintiff States did not contribute a single cent of the funds provided to North Carolina, and the States have no basis in law or fact for asserting their own ownership interest in, or restitutionary claim to, the Commission's funds.

Because the Commission's claims for restitution belong solely to the Commission and cannot be asserted by the States, North Carolina is immune from the Commission's claims in this Court. The only claims over which this Court has jurisdiction are the contract and quasi-contract claims asserted by the

plaintiff States, seeking remedies for their own distinct injuries.

II. The Special Master also erred in declining to recommend granting North Carolina's motion for summary judgment on the quasi-contract claims asserted in Counts III, IV and V. Those claims are barred as a matter of law by the settled common-law rule that where the parties' relationship concerning a given subject matter is governed by the terms of an express contract, no equitable claim will lie in addition to a claim for breach of contract. Here, the Compact fully and exclusively governs the obligations North Carolina has to the party States with respect to the siting, licensing, and development of a low-level radioactive waste disposal facility within the State of North Carolina. Either the express contractual obligations established by that Compact were breached, or they were not. But either way, no additional equitable obligation can be implied at law beyond the specific obligations explicitly accepted by the sovereign States that agreed to the Compact, and consented to by the Congress that enacted the Compact as federal law.

ARGUMENT

I. THE COMMISSION'S CLAIMS ARE BARRED BY NORTH CAROLINA'S SOVEREIGN IMMUNITY.

The State of North Carolina moved to dismiss the claims of the Commission for lack of jurisdiction and for failure to state a claim upon which relief can be

granted on the grounds that the Commission's claims are barred by the Eleventh Amendment and by the constitutional and common-law principles of sovereign immunity embodied in that Amendment. The Special Master recommended denial of North Carolina's motion, concluding that a non-State party may overcome a State's sovereign immunity from suit in federal court so long as the State is already being sued by another plaintiff against whom the State cannot assert sovereign immunity, and so long as "the non-State party asserts the same claims and seeks the same relief" as the proper plaintiff. Prelim. Report 6.

This Court should reject the Special Master's recommendation and dismiss the Commission's claims for two reasons. First, recent decisions of this Court confirm that a State is conclusively entitled to assert sovereign immunity against claims by non-State entities even if other plaintiffs are permissibly suing the State. Second, the Commission's claims in any event are not identical to those asserted by the State plaintiffs, and thus they are barred by the very principle cited by the Special Master.

A. North Carolina Is Immune From The Commission's Claims Without Regard To Other Plaintiffs' Claims.

1. *North Carolina's Sovereign Immunity Applies To All Claims Except Those By The United States Or A Sister State, And The Commission Is Neither.*

The Eleventh Amendment applies to original actions in this Court, barring suit against an unconsenting State unless the suit is brought by a plaintiff against whom the State cannot assert sovereign immunity. *See Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934). Although the Eleventh Amendment by its terms bars only suits against States by citizens of other States, it is now settled that "the bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit." *Alden v. Maine*, 527 U.S. 706, 736 (1999). In addition to diversity suits, States are constitutionally immune from suits by foreign nations, *see Monaco, supra*, by federal corporations, *see Smith v. Reeves*, 178 U.S. 436 (1900), and by Indian tribes, *see Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).[4]

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[4] Even if one regards the immunity recognized in these decisions as only a common-law immunity from suit by any non-federal, non-State entity, subject to abrogation by Congress, *see, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 130-42 (1996) (Souter, J., dissenting); *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 700 (1999) (Breyer, J., dissenting), that immunity

This Court's precedents have recognized only two types of suits against which a State may not invoke constitutional immunity: a suit by the United States, *see United States v. Texas*, 143 U.S. 621 (1892), and a suit by a sister State, *see South Dakota v. North Carolina*, 192 U.S. 286 (1904). Even as to those types of suits, the general understanding is that the States actually have consented to suit, albeit not in the individual case, but more broadly in the plan of the Convention that underlies our constitutional structure. *See Alden*, 527 U.S. at 755 ("The States have consented ... to some suits pursuant to the plan of the Convention or to subsequent constitutional amendments. In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government."); *see also Monaco*, 292 U.S. at 328.

North Carolina is immune from the Commission's claims because the Commission is neither the United States nor a sister State. That conclusion is implicit in this Court's decision to deny the Commission leave to file the complaint in No. 131, Original. In addition, this Court has twice held that a Compact Clause entity is not a State "for Eleventh Amendment purposes" when the entity sought to cloak itself in the immunity of its member States. *Hess v. Port Auth. Trans Hudson Corp.*, 513 U.S. 30, 42 (1994); *see also Lake*

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would extend to suit by the Commission, because the Commission is a non-federal, non-State entity, and North Carolina's immunity from suit has not been abrogated by Congress, *see infra* note 6.

Country Estates, Inc. v. Tahoe Reg. Planning Agency, 440 U.S. 391, 401-02 (1979).

The Southeast Compact confirms the general rule that Compact Clause entities are not considered States. The Compact defines the Commission as "a legal entity separate and distinct from the party states" and explicitly provides that the Commission's liabilities "shall not be deemed to be liabilities of the party states." Compact, Article 4(M)1.

2. *North Carolina Has Not Consented To Suit By The Commission.*

Because the Commission is not a sister State entitled to sue in this Court under the plan of the Convention, the Commission can proceed with its own claims here only if North Carolina waived its immunity from suit by the Commission. It has not.

"The test for determining whether a State has waived its immunity from federal court jurisdiction is a stringent one." *State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). The waiver must be "unequivocal," *id.*, evidenced either by "the most express language," *id.* at 240 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)), or by litigation conduct-such as removal by the State itself to federal court-that expresses the State's acceptance of federal jurisdiction with equal "clarity," *see Lapides v. Bd. of Regents*, 535 U.S. 613, 620 (2002); *see generally College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676, 678 (1999). Neither form of waiver exists here. There certainly has been no express waiver, and

at every stage of the litigation North Carolina has consistently and vigorously opposed the assertion of jurisdiction by this Court over the Commission's claims.[5]

Nor can the Commission derive any tacit waiver of immunity-much less a clear and unequivocal waiver-from the terms of the Compact itself. Far from expressing the required "unequivocal waiver specifically applicable to federal-court jurisdiction," 473 U.S. at 241, the Compact says not one word about any member State's acquiescence to any suit by the Commission in any court, federal or otherwise. Absent a clear and unequivocal waiver of its immunity, North Carolina remains immune from suit in this Court by the Commission.[6]

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[5] The fact that North Carolina might consent to suit in its own courts is irrelevant: "a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation." *College Sav. Bank*, 527 U.S. at 676.

[6] Even if North Carolina's immunity from suit were only a common-law immunity subject to abrogation by Congress, *see supra* note 4, there has been no abrogation of immunity here. Like a waiver, "an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language." *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478 (1987). The Compact contains no abrogation language of any kind, much less unmistakably clear abrogation language. The Compact says only that the Commission can appear in "any court of law," Compact, Article 4(E)10., which of course says nothing about whether any State may be subjected to suit in federal

3. *The Presence Of State Plaintiffs Does Not Strip North Carolina Of Its Sovereign Immunity Against Claims By The Commission.*

Contrary to the Special Master's recommendation, the presence of plaintiff States with jurisdictionally proper claims does not strip North Carolina of its immunity from the claims of the Commission. "A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) ("*Pennhurst II*").

In *Pennhurst II*, private party plaintiffs were seeking to establish federal jurisdiction over claims against an unconsenting State for violations of state law. The United States was also a plaintiff in the action. The private plaintiffs argued that their claims should be able to proceed despite the Eleventh Amendment because the State was not immune from the claims of the United States. The Court rejected the argument:

> We ... do not agree with respondents that the presence of the United States as a plaintiff in

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court. *See Welch, supra* (statement that "any seaman" can sue in federal court does not abrogate States' immunity from federal suit by seamen); *Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 283 (1973) (statement that suit could be brought in "any court of competent jurisdiction" does not abrogate States' immunity from suit).

> this case removes the Eleventh Amendment from consideration. Although the Eleventh Amendment does not bar the United States from suing a State in federal court, the United States' presence in the case for any purpose does not eliminate the State's immunity for all purposes.

Id. at 103 n.12 (citations omitted). Likewise, here, the presence of the plaintiff States for the permissible purpose of asserting their own rights under the Compact does not require that North Carolina be subjected against its will to claims by a non-sovereign, non-State entity for $80 million (as well as interest and attorney fees) from the state treasury.

Under this Court's Eleventh Amendment jurisprudence, it makes no difference whether a federal court has "jurisdiction" of any kind over a given claim against a State. All that matters is whether the State decides to invoke its immunity against that claim. *See Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 251 (1985) ("whether the State has consented to waive its constitutional immunity is the critical factor in whether the federal courts properly exercised ancillary jurisdiction"). If the State does not invoke that immunity, then the federal court may exercise its jurisdiction and the claim may proceed to judgment. *See Wisconsin Dep't of Corrections v. Schact*, 524 U.S. 381, 389 (1988) ("the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so"). But if the State does invoke its immunity against a claim, then the court loses its power to adjudicate that

claim. *See id.* at 392-93 ("A State's proper assertion of an Eleventh Amendment bar after removal means that the federal court cannot hear the barred claim. But that circumstance does not destroy removal jurisdiction over the remaining claims ... before us."). In other words, the mere existence of federal jurisdiction - be it original or removal or the more ephemeral "ancillary" jurisdiction - is not enough to force a sovereign State to submit to the claims of an unwanted suitor. *See Oneida County*, 470 U.S. at 251. In *Oneida County*, a party whose claims against a State were otherwise barred by the Eleventh Amendment argued that the claims could be heard because they fit within the normal "ancillary jurisdiction" of the federal court. This Court agreed that the claims "raise[] a classic example of ancillary jurisdiction," 470 U.S. 251, but held, relying on *Pennhurst II*, that such jurisdiction did not suffice to overcome the State's sovereign immunity:

> The Eleventh Amendment forecloses ... the application of normal principles of ancillary and pendent jurisdiction where claims are pressed against the State .... [N]either pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment. A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment. The indemnification claim here, whether cast as a question of New York law or federal common law, is a claim against the State for retroactive monetary relief. In the absence of the State's consent,

> the suit is barred by the Eleventh Amendment. Thus, as the Court of Appeals recognized, whether the State has consented to waive its constitutional immunity is the critical factor in whether the federal courts properly exercised ancillary jurisdiction over the counties' claim for indemnification.

Oneida County, 470 U.S. at 251 (quotations and citations omitted).

It is true that some earlier cases allowed non-State, non-federal parties to intervene as plaintiffs in original actions against non-consenting States when the United States was already a plaintiff in the action, and when the non-governmental party was asserting the same claims as the United States. *See Arizona v. California*, 460 U.S. 605, 614 (1983); *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981). Those decisions were apparently premised on a kind of "harmless jurisdictional error" theory: once the State was already subject to claims validly asserted pursuant to the Court's original jurisdiction, there was no material additional burden on the State to subject it to jurisdiction over the same claims asserted by another party. As the *Arizona* Court reasoned:

> The Tribes do not seek to bring new claims or issues against the States, but only ask for leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore our judicial power over the controversy is not enlarged by granting leave to intervene, and the States'

> sovereign immunity protected by the Eleventh Amendment is not compromised.

460 U.S. at 614. The *Maryland* Court offered little by way of explanation for overriding Eleventh Amendment immunity other than a cite to *Oklahoma v. Texas*, 258 U.S. 574, 582 (1922), in which Eleventh Amendment immunity does not appear to have been asserted,[7] and a "cf." cite to a private civil case involving intervention where it would cause the defendant "relatively little additional burden," *Trbovich v. Mine Workers*, 404 U.S. 528, 536 (1972).

The theory suggested in those cases reflects an improperly narrow conception of the Eleventh Amendment as governing only the exercise of this Court's subject matter jurisdiction. Once that jurisdiction is properly invoked, the reasoning suggests, the sovereign immunity underlying the

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[7] *Oklahoma* does not discuss Eleventh Amendment immunity, but in explaining why private parties in the case should be allowed to intervene in the original action, it posits a theory of "ancillary" jurisdiction that is essentially the mirror opposite of the "no enlargement" theory offered in *Arizona*: whereas the *Arizona* Court assumed that the addition of otherwise-barred claims would not enlarge this Court's jurisdiction once the United States has already properly invoked it, the *Oklahoma* Court assumed that allowing private claims to proceed would enlarge the Court's jurisdiction, but that such enlargement was permissible because the new jurisdiction was "ancillary" to its original jurisdiction over the claims of the United States and of sister States. *See* 258 U.S. at 581-82.

Amendment ceases to operate. That view simply cannot be reconciled with the long line of cases recognizing that the Eleventh Amendment is *not* solely about the exercise of the federal judicial power, but embodies a more fundamental sovereign immunity from suit in *all* courts against all claims by *all* non-federal, non-State parties, unless there is a valid waiver or abrogation of immunity.

As early as *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), Chief Justice Marshall explained that the Eleventh Amendment is premised not so much on the indignity of subjecting a State to suit in federal court, but on the indignity of being subjected to suit by monetary creditors who - like the Commission here - are not sister States, *id.* at 406-07.

More recently, the Court's holding in *Alden*, that the Eleventh Amendment's core protection of sovereign immunity extends to suit in state court, establishes that sovereign immunity implicates more than just the exercise of federal judicial power. The "States' immunity from suit is a fundamental aspect of the[ir] sovereignty," *Alden* explains, and it "neither derives from nor is limited by the terms of the Eleventh Amendment." 527 U.S. at 713.

> While the constitutional principle of sovereign immunity does pose a bar to federal jurisdiction over non-consenting States, this is not the only structural basis of sovereign immunity implicit in the constitutional design. Rather, there is also the postulate that States of the Union, still possessing attributes of

> sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention. This separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution.

527 U.S. at 730 (quotations, citations, and alterations omitted). The Eleventh Amendment, in other words, is not only a limitation on this Court's jurisdiction (though it is at least that), but also an expression of the State's sovereign right to decide when and where and by whom it may be sued.

It is not just *Alden* that recognizes this fundamental point. Indeed, one does not even have to accept *Alden*'s basic holding that Congress may not abrogate a state's immunity from suit in her own courts, *see, e.g.*, *Alden*, 527 U.S. at 760 (Souter, J., dissenting), to accept that a State is immune from suit in any court absent her consent at least as a matter of common law, unless Congress validly abrogates her immunity, *see id.* at 798; *College Sav. Bank*, 527 U.S. at 700 (Breyer, J., dissenting) ("Sovereign immunity is a common-law doctrine .... permitting Congress to narrow or abolish state sovereignty where necessary."); *supra* note 4. Thus, although the scope of Eleventh Amendment immunity has been vigorously disputed in this Court's opinions, the Court has been unanimously of the view that, at least barring a valid abrogation, the Amendment "grants the State a legal power to assert a sovereign immunity defense should it choose

to do so." *Schacht*, 524 U.S. at 389; *see Hess*, 513 U.S. at 39 ("The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals."); *see also Briscoe v. President & Dirs. of Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 321 (1837) ("No sovereign state is liable to be sued without her consent."). Because there has been no abrogation here, *see supra* note 4, the limits of North Carolina's immunity from suit by non-federal, non-State entities are defined only by her own consent - not by the assertion of this Court's jurisdiction.

The Court has "long recognized that a State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'" *College Sav. Bank*, 527 U.S. at 675 (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)). Thus a State may waive its immunity from suit in state court but not federal, *see id.* at 676, and a State may waive its immunity from suit by persons bringing state law claims but not analogous federal claims, *see Alden*, 527 U.S. at 758. To the extent that a State chooses "to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit." *Id.* The States' consent in the plan of the convention to one class of claims thus does not waive the States' immunity from others, such that barred claims may ride piggy back on permitted claims. To so hold would nullify the State's constitutional (or common law) privilege to decide when it will consent to be sued.

Beyond the two kinds of suits specifically contemplated in the founding era, this Court made clear in *College Savings Bank* that there are only "two circumstances" in which a State may be subjected to suit in federal court: when Congress validly abrogates the State's immunity, and when the State waives its immunity. 527 U.S. at 670. There has been no abrogation by Congress and no waiver by North Carolina here. *College Savings Bank* says nothing about a "third circumstance," *i.e.*, when the State is already being sued by the United States or by other States. It follows that even if the plaintiff States are entitled to proceed against North Carolina on their own claims, North Carolina remains immune from suit by the Commission.

B. North Carolina Is Immune From The Commission's Claims Because They Are Distinct From The Claims Asserted By The States.

The Special Master's recommendation to deny North Carolina's motion to dismiss the Commission's claims rested on his reading of precedents, discussed above, "suggest[ing] that a non-State party may join a State ... in suing a State in the Supreme Court's original jurisdiction so long as the non-State party asserts the same claims and seeks the same relief as the other plaintiffs." Prelim. Report 5-6.

As demonstrated above, those precedents cannot be reconciled with decisions of this Court holding that sovereign immunity is each State's "personal privilege" to assert, and is not dependent on the existence of

other claims to which the States originally consented in the plan of the convention. But even if the decisions cited by the Special Master survived the sovereign immunity analysis in subsequent cases such as *Alden*, those decisions still would not save the Commission's claims here, because, as the Special Master recognized, they do not apply to the extent that "the Commission asserts claims that the States themselves cannot assert." *Id.* at 6. And as the Special Master further recognized, the quasi-contract claims for restitution of the $80 million provided to North Carolina by the Commission "appear to *belong exclusively to the Commission*, since it provided the funds at issue." Second Report 42 (emphasis added). Although the Special Master's reports have thus far declined to resolve that issue conclusively, there is no basis for further delay. Discovery on the issue is now complete, and it is clear from the undisputed record that, as a matter of law and fact, only the Commission can pursue restitution of the $80 million - the States have no legal or factual claim to those funds. Because North Carolina has not consented to the Commission's claims for restitution of the funds, this Court cannot assert jurisdiction over those claims.

1. *The Plaintiff States May Not Seek Restitution Of Funds Provided To North Carolina By The Commission.*

It is axiomatic that restitution is only available to a party that itself conferred a benefit on another party. "A party's restitution interest is his interest in having restored to him any benefit that he has conferred on the other party. Restitution is, therefore, available to a party only to the extent that he has conferred a benefit on the other party .... The benefit *must have been conferred by the party claiming restitution.*" *Restatement (Second) of Contracts* § 370 cmt. a (1981) (emphasis added) (citation omitted); accord *Restatement of Restitution* § 1 cmt. a (1937) ("A person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money.").

Federal courts have routinely applied the principle requiring that a plaintiff seeking the remedy of restitution to show that the plaintiff (rather than a third party) actually conferred the benefit on the defendant. *See In re Rezulin Products Liability Litig.*, 392 F. Supp. 2d 597, 619 (S.D.N.Y. 2005) ("The benefit at issue must have been conferred on the defendant by the plaintiff, not by some third party."); *Eli Lilly and Co. v. Roussel Corp.*, 23 F. Supp. 2d 460, 496 (D.N.J. 1998) ("[I]t is the plaintiff's (as opposed to a third party's) conferral of a benefit on defendant which forms the basis of an unjust enrichment claim."). The decision in *City & County of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130 (N.D. Cal. 1997) is

instructive. In that case, twelve local governments sued various cigarette manufacturers alleging a conspiracy to misrepresent the adverse health effects of smoking. The local governments brought a claim for restitution, which asserted that because of the misrepresentations, the defendants had earned significant profits from the sale of cigarettes to indigent persons who, in turn, had suffered major health problems, resulting in increased public health care costs to the plaintiffs. The plaintiffs contended that the defendants' failure to pay for these health-related costs had unjustly enriched them. *Id.* at 1144. The court rejected the claim:

> While courts have broad equitable powers to redress wrongs, plaintiffs are asking this Court to stretch its powers too far here. If defendants have indeed been unjustly enriched, in that their profits were increased as a result of wrongful conduct, *the enrichment was at the expense of individual smokers, not of the city and counties.* Plaintiffs cite no benefit which has been conferred on defendants by plaintiffs themselves.

Id. (citation omitted) (emphasis added).

The black-letter rule that a plaintiff may seek restitution only of moneys paid by the plaintiff itself (directly or through a proper legal agent) precludes the States here from seeking restitution of the moneys paid by the Commission to North Carolina. As shown in the next section, the Plaintiff States neither possessed any ownership interest in the Commission's

money nor sent any funds of their own to North Carolina. No monetary benefit whatsoever was provided to North Carolina by the Plaintiff States. For this reason, while the Plaintiff States can (in theory) pursue a breach of contract claim against North Carolina and seek the recovery of their own expectation damages or out-of-pocket losses, the Plaintiff States cannot assert any claim seeking the recovery of money provided to North Carolina by the Commission. It is only the Commission - and not the Plaintiff States - that can assert any claim for restitution of moneys paid by the Commission to North Carolina.

2. *The Southeast Compact's Structure And Operating History Show That All Funding Assistance Came Exclusively From The Commission*.

The Compact clearly and unmistakably establishes the Commission as a separate legal entity from the member States:

> The Commission herein established is a legal entity separate and distinct from the party states capable of acting on its own behalf and is liable for its actions. Liabilities of the Commission shall not be deemed liabilities of the party states.

Compact, Article 4(M)(1). The Commission also has the independent authority to impose and collect special fees and surcharges on users of any regional waste

facility to fund activities in furtherance of its defined duties. Compact, Article 4(H)(2).

The Commission exercised that authority to produce the funds provided to North Carolina. As noted by the Special Master, "[t]he Commission's funds did not come from the party States. Rather, they were raised through surcharges and fees imposed on waste generators who used the Barnwell facility in South Carolina." Second Report 15. The funds thus were "Commission Funds," not State funds. *Id.* at 16. To raise the funds, the Commission imposed a variety of revenue-producing mechanisms on waste disposed at the Barnwell facility, including a per cubic foot surcharge, a capacity assurance charge under Article 4(H), access fees on generators located within the region established under Article 3(B), as well as separate access fees for out-of-region generators. Def. App. 152a-56a. Of the $79.9 million in financial assistance provided by the Commission, $56.3 million came from fees and surcharges paid by generators located within the Compact region, while $23.6 million was paid by out-of-region generators. Def. App. 98a. Additionally, over $35 million of the $56.3 million paid by in-region generators resulted from access fees assessed under Article 3(B) of the Compact as distinguished from capacity charges imposed and collected pursuant to Article 4. Def. App. 152a-56a.

The Special Master's conclusion from the record is unassailable: "It is undisputed that the Commission, rather than the party States themselves, provided North Carolina with approximately $80 million in financial assistance." Second Report 42.

3. *The States Themselves Have No Cognizable Legal Interest In The Commission's Own Funds.*

A State cannot invoke original jurisdiction for the benefit of non-State entities, even if the State asserts some indirect economic interest in the claim. *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 394 (1938). "T]he State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest." *Id.* at 396. Where it is apparent that the name of the state is being used simply for the prosecution of a claim of another entity, the original jurisdiction of this Court cannot be maintained. *Kansas v. United States*, 204 U.S. 331, 341 (1907).

Although the Plaintiff States here "concede that the Commission rather than the States themselves provided the funds in question," (Second Report 46), the States nevertheless assert a direct legal interest in the Commission's funds, which they say entitles them to pursue restitution of the funds in their own behalf. The States articulated two theories of direct interest before the Special Master:

> First, they argue that the funds raised by the Commission through fees and surcharges should be considered contributions by the States within the meaning of the Compact. Second, they argue that the Commission was acting as the States' agent when it provided the funds in question to North Carolina.

Id. at 46-47. Neither theory has any legal or factual basis.

a. *The Compact Does Not Give The States Any Ownership Interest In The Fees And Surcharges Collected By The Commission.*

Plaintiffs first contend that the funds transmitted to North Carolina actually belonged to the Compact's member States. This argument relies upon Article 4(H)2.b. of the Compact, which provides that certain fees and surcharges levied on private generators under that provision "represent the financial commitments of all party states to the Commission." It is clear from its context, however, that this provision does nothing to convert the revenues of the Commission into property of the States.[8]

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[8] The undisputed facts show that only a small percentage of the funds collected by the Commission from waste generators using the Barnwell facility constituted Article 4(H)2.b. capacity charges paid by in-region generators. The vast majority of the total funds provided to North Carolina either were collected from generators from outside the Southeast Compact region, or were access fees imposed on in-region generators pursuant to Article 3(B) of the Compact. Def. App. 152a-56a. And nothing in the Compact provides that revenues raised pursuant to Article 3(B) represent the "financial commitments" of the party States. The evidence shows that some $35 million provided to North Carolina came from fees and surcharges imposed pursuant to Article 3(B) and another $23.4 million came from out-of-region access fees. Only the capacity charges paid by generators located within the Compact region could

Article 4 of the Compact is entitled "The Commission," and all of the provisions thereunder concern the Commission. Article 4(H), in its entirety, addresses funding for the Commission. Compact, Article 4H ("Funding for the Commission must be provided as follows:"). And with one trivial exception, none of its provisions contemplate revenues to or from the States. The exception is sub-paragraph 1., which compels each State to make an initial payment of $25,000 "to the Commission which shall be used for the costs of the Commission's services." Beyond that initial payment, the Commission's annual revenues are to be derived entirely from "special fees or surcharges on all users of the facility" based on waste volume, the total of which:

a. must be sufficient to cover the annual budget of the Commission; and
b. must represent the financial commitments of all party states to the Commission; and
c. must be paid to the Commission.

Compact, Article 4(H)2. These sub-parts must be read together and in light of the provision's singular express purpose of providing funding for the Commission. *See Dolan v. USPS*, 546 U.S. 481, 486 (2006); *FTC v. Mandel*, 359 U.S. 385, 389 (1959).

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even possibly "represent the financial commitments" of the member States under Article 4, and that amount did not exceed $21 million.

Read in that proper context, it is clear that the "financial commitments" language was not intended to transform the fees and surcharges collected directly by the Commission from private generators into legally recognized assets of the member States. Had there been an intent for the funds to belong to the States, Article 4(H)2. would not have used the word "commitments," but instead would have used the word "assets," "property," or some other similar term connoting a possessory interest in the States. The phrase "financial commitments" instead establishes and limits each State's financial liability to the Commission: whatever may be the Commission's annual budgetary needs, each State's individual financial obligation to the Commission under the Compact will never exceed the initial $25,000 payment. By operation of Article 4(H)2., all other liabilities for the Commission's annual budget are deemed legally satisfied by the fees and surcharges imposed on private generators. The collection of fees and surcharges from generators thus ensured that no further taxpayer money would be taken from the member States' treasuries to be used in funding the Commission's budget.

The proper meaning of sub-paragraph b. is further evidenced by its positioning between sub-paragraph a. (which requires that the surcharges be sufficiently large so as to cover the Commission's annual budget) and sub-paragraph c. (which requires that the surcharges, once collected, be paid to the Commission). Compact, Article 4(H)2. The common feature of all three sub-paragraphs is to establish assets for use by

the Commission-not to create assets owned by the member States.

Even if the funds could in theory be described as the States' assets for some indeterminate moment in time as they passed from private generators to the Commission, they certainly ceased being the States' assets when the Commission assumed exclusive domain over them. As discussed above, the Compact unambiguously established the Commission as a separate legal entity. Compact, Article 4(M)1. The Commission in turn functions autonomously - maintaining its own bank account, hiring employees, renting office space, and otherwise operating as a fully viable legal entity. Thus, any ownership interest the member States would have possessed even in theory under Plaintiffs' interpretation of Section (H)2.b. would have ended upon the payment of the funds to the Commission: at that point the Commission would have been the legal owner of the funds and its ownership would have continued through such time as the funds were disbursed to North Carolina.

Because the surcharge funds never belonged to the Plaintiff States-and certainly did not belong to them at the time financial assistance was provided to North Carolina-the Plaintiff States cannot assert claims sounding in restitution to recover those funds.

b. *The Commission Did Not Act As An Agent For The Party States When Disbursing Commission Funds To North Carolina.*

Plaintiff States also argue that the Commission acted as the "agent" of the Plaintiff States such that its provision of funds to North Carolina was legally undertaken on their behalf. This argument is equally meritless.

"Agency" is "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 392 (1982) (quoting *Restatement (Second) of Agency* § 1 (1958)). The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control. *Restatement (Second) of Agency* §1, cmt. a.

Plaintiffs' attempt to invoke agency principles in this case lacks both a factual and a legal foundation. At the various times the surcharge funds were transmitted by the Commission to North Carolina, no agreement existed between the Commission and the Plaintiff States purporting to establish the Commission as the agent of each member State. The only agreement executed at all by the member States relating to the Compact was the Compact itself. Nothing therein purported to create an agency relationship so as to make the Commission the agent of each member State regarding the ownership of the

surcharge funds. To the contrary, clear and unambiguous language in the Compact: (1) established the Commission as "a legal entity separate and distinct from the party states capable of acting in its own behalf and ... liable for its actions"; and (2) made clear that "[l]iabilities of the Commission shall not be deemed liabilities of the party states." Compact, Article 4(M)1. If the Commission were the States' agent, then the States would be liable to others for its actions. Yet the Compact explicitly provides exactly the opposite. Plaintiffs have yet to point to any authority recognizing a legal agency relationship under such circumstances.

Plaintiffs' agency argument is also inconsistent with the provision of the Compact that authorizes sanctions (in the form of suspension or expulsion from the Compact) to be imposed by the Commission on member States who fail to comply with the provisions of the Compact. See Compact, Article 7(F). Obviously, the notion of an agent possessing punitive powers over its principal is completely inconsistent with basic tenets of a principal/agent relationship.

Plaintiffs' agency theory is equally inconsistent with provisions in Article 4 of the Compact mandating that surcharges "be paid to the Commission" and that they be used "to cover the annual budget of the Commission." Compact, Article 4(H)2.a. and c. This language refutes any suggestion that surcharge revenue was simply to be held by the Commission subject to the demands of each member State in its respective capacity as the Commission's principal. By virtue of these provisions of the Compact, the

individual member States had no control or dominion *at all* over the surcharge funds-much less the type of absolute control that is at the core of a principal/agent relationship. Rather, sub-paragraphs a. and c. of Article 4(H)2. firmly established that the surcharges were to be paid directly to, and used solely by, the Commission itself.

Plaintiffs' agency argument also ignores the undisputed fact that resolutions authorizing the transmittal of the funds were passed by the Commission before any of the surcharge funds were sent to North Carolina. Nothing in these resolutions stated or suggested in any way that the Commission was providing these funds to North Carolina in an agency capacity on behalf of the individual member States. *See* Def. App. 72a, 86a, 87a.

The Compact also makes clear that *the appointed Commissioners*, not the party States themselves, control the Commission by majority vote of *the individual Commissioners* (*i.e.*, rather than votes by States). *See* Compact, Article 4(B) (Commission action not binding unless agreed upon by majority of Commissioners), Compact Article 4(E)9. (recognizing that Commissioners from the same State may cast conflicting votes). No member State can instruct the Commission to do anything-contrary to a genuine agency relationship.[9]

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[9] Even if both members of the Commission from a party state request the Commission to act or appear on behalf of such state, "[t]he authority to act, intervene, or otherwise appear shall be exercised by the Commission only after

This Court's own precedent confirms that Compact Clause entities do not operate subject to the individual control of member States that would be characteristic of an agency relationship:

> Because Compact Clause entities owe their existence to state and federal sovereigns acting cooperatively, and not to any "one of the United States," their political accountability is diffuse; they lack the tight tie to the people of one State that an instrument of a single State has.... [B]istate entities created by compact ... are not subject to the unilateral control of any one of the States that compose the federal system.

Hess v. Port Auth. Trans Hudson Corp., 513 U.S. 30, 42 (1994) (citations omitted); *see also* Matthew S. Tripolitsiotis, *Bridge Over Troubled Waters: The Application of State Law to Compact Clause Entities*, 23 Yale L. & Pol'y Rev. 163, 167, 184 (2005) ("While it might seem that the agencies are subject to the interests of the sovereigns that created them, each creating sovereign no longer has exclusive control over the area of the agency's jurisdiction; [C]ompacts create entities that are no longer beholden to their creators.").

Contrary to the argument advanced by plaintiffs below, the basic corporate structure of the Commission does not authorize suit by individual member States to recover funds expended by the Commission on an

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approval by a majority vote of the Commission." Compact Article 4(E)10.

agency theory. To the contrary, the Commission's corporate structure precludes such suits. As noted above, the Compact expressly provides that the Commission is a legal entity separate and distinct from the party States and that its liabilities shall not be imputed to the party States. Compact, Article 4(M)1. The reference to "a 'separate legal person'" indicates "that Congress had corporate formalities in mind." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). And "where parties choose the corporate form and receive all the benefits that flow from that structure, we should be hesitant to ignore the consequences." *Jackson v. Volvo Trucks N. Am., Inc.*, 462 F.3d 1234,1241 (10th Cir. 2006).

The relevant consequence here is that a member of an association, like the stockholder of a corporation, generally may not bring a distinct, individual suit seeking restoration of funds belonging to the association (or corporation) itself. *See Indus. Elecs. Corp. of Wisconsin v. iPower Distrib. Group, Inc.*, 215 F.3d 677, 680 (7th Cir. 2000) ("The association agreement created a new legal entity, much as a corporate charter does, whose investors were the eight dealers. Those eight dealers stood as shareholders in a corporation and could not sue a third party individually or on behalf of the corporation."). "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities," *Dole*, 538 U.S. at 474, and thus "a stockholder of a corporation has no personal or individual right of action against third persons for damages that result indirectly to the stockholder because of an injury to the corporation."

Twohy v. First Nat'l Bank of Chicago, 758 F.2d 1185, 1194 (7th Cir. 1985).[10]

In short, like any other corporate shareholder or association member, the plaintiff States have no legal basis for pursuing their own individual claims for recovery of money allegedly owed to the association entity. The quasi-contract claims for restitution of the funds provided to North Carolina by the Commission belong solely to the Commission. The Commission's claims for such restitution thus are not, and legally cannot be, the same claims asserted by the States, which can seek (in theory) at most only recovery of their own out-of-pocket expenses.[11] Because the

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[10] An individual shareholder or member may assert the corporate entity's claims in a "derivative" capacity only when the entity itself declines suit, and only when the entity itself could otherwise sue. *See Daily Income Fund v. Fox*, 464 U.S. 523, 529 (1984) ("the term 'derivative action' ... has long been understood to apply only to those actions in which the right claimed by the shareholder is one the corporation could itself have enforced in court"); *Hawes v. Oakland*, 104 U.S. 450, 460 (1882) (derivate suit must be "founded on a right of action existing in the corporation itself" and thus "the corporation itself [must be] the appropriate plaintiff"). Here, because North Carolina is immune from claims by the Commission *qua* Commission, the party States cannot asserts the Commission's claims on its behalf.

[11] This conclusion holds regardless whether the Court adopts the Special Master's recommendation to grant summary judgment to North Carolina on the substantive

Commission's claims are not the same as the States', North Carolina is entitled to assert its sovereign immunity against the Commission's claims. Those claims should be dismissed.

II. NORTH CAROLINA IS ENTITLED TO SUMMARY JUDGMENT ON THE STATES' QUASI-CONTRACT CLAIMS IN COUNTS III, IV, AND V.

While North Carolina excepts from the Special Master's recommendation to deny the motion to dismiss all claims of the Commission for lack of jurisdiction, North Carolina of course agrees with the recommendations to dismiss Count I (summary enforcement of Commission sanctions order) on its merits, and to grant summary judgment to North

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merits of the plaintiff's breach of contract claim (Count II). Even if the States were allowed to pursue their own remedies for breach of the Compact, they have no legal basis for pursuing restitution to the Commission as a contract remedy. Not only did the funds belong exclusively to the Commission, but plaintiffs also cannot point to any provision *in the Compact* conditioning North Carolina's receipt of funds from the Commission on the construction of a facility prior to withdrawal. The Commission itself is not a party to the Compact, and even if North Carolina's exercise of its unambiguous withdrawal rights somehow constituted a breach of its obligations to the other party States, North Carolina was never under any Compact-based obligation *to the Commission* to construct a facility or return the funds. Again, the Commission's legal interest in those funds is distinct from the States'.

Carolina on Count II (breach of the Compact) on its merits. What remains are Counts III-V, equitable claims seeking recovery of the funds provided to North Carolina by the Commission. Count III asserts a claim of unjust enrichment, Count IV asserts a promissory estoppel, and Count V asserts the obscure claim of "money had and received." Despite their distinct labels, the gravamen of each claim is the same: North Carolina received money from the Commission but ultimately provided nothing in return, and should be required to return the money in equity and good conscience.[12]

The plaintiffs' quasi-contract claims cannot survive alongside the claim for breach of the express Compact terms. North Carolina's obligations to its sister States with regard to low-level radioactive waste disposal are governed entirely by the Compact. The whole point of the Compact is to establish the sole legal "instrument and framework" for a joint effort to dispose of such waste. Compact, Article 1 ("Policy and purpose"). And the Compact itself makes clear that the explicit obligations it creates concerning disposal facilities are the sum total of each State's obligations to the others: "The rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and nothing in this compact shall be construed to infringe upon, limit or abridge those rights." Compact, Article 3 (emphasis added).

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[12] Count V - Money had and received - explicitly seeks to have North Carolina "pay over to *the Commission* $79,930,337." (Comp. ¶ 86) (emphasis supplied)

It is a settled common-law rule that "there can be no claim for unjust enrichment when an express contract exists between the parties." *Albrecht v. Comm. on Employee Benefits of Fed. Reserve Employee Benefits Sys.*, 357 F.3d 62, 69 (D.C. Cir. 2004). That is, where an express contract establishes the terms of the parties' relationship concerning a given subject matter, the contract's terms are exclusive, and a party that has not breached the express contract cannot be subjected to an equitable claim asserting the breach of other, non-contractual obligations involving the same subject matter. "When a valid agreement already addresses the matter, recovery under an equitable theory is generally inconsistent with the express agreement." *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000); *accord Booe v. Shadrick*, 369 S.E.2d 554 (N.C. 1988); *County Comm'rs of Caroline County v. J. Roland Dashiell & Sons, Inc.*, 747 A.2d 600 (Md. 2000); *Interbank Invs. v. Eagle River Water & Sanitation Dist.*, 77 P.3d 814, 816 (Colo. Ct. App. 2003); *Bloomgarden v. Coyer*, 479 F.2d 201, 210 (D.C. 1973); *Schiff v. American Ass'n of Retired Persons*, 697 A.2d 1193, 1194 (D.D.C. 1997); *Miller v. Schloss*, 218 N.Y. 400, 218 N.Y. (N.Y.S.) 400, 113 N.E. 337 (1916); *Parsa v. State*, 64 N.Y.2d 143, 474 N.E.2d 235, 485 N.Y.S.2d 27 (1984) (money had and received is a contract implied in law which the law creates in the absence of an agreement). Thus, for example, in *Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42 (Tex. 2008), the court held that an excess insurer did not breach its contractual coverage obligation, and the court refused to recognize an equitable right to reimbursement

because to do so would have required the court to effectively modify the policies' language. *Id.* at 50.

The same rule applies here - with greater force, if anything. An interstate compact is a unique creature of federal and state law, through which Congress and multiple sovereign States together work out and impose on the member States very specific obligations they would otherwise be free to forgo as sovereign entities. Unstated duties should not be imposed, simply by operation of equity, on top of those obligations carefully detailed by the sophisticated political and sovereign actors that negotiate, draft, enact, and implement interstate compacts.

The claims set forth in Counts III, IV, and V seek equitable reimbursement of the funds provided by the Commission to assist in North Carolina's efforts to perform its Compact obligations. But the Compact itself is the sole and exclusive source of North Carolina's obligations to the other party States in respect to the siting and licensing of a disposal facility. If North Carolina did not breach the terms of the Compact, then it cannot be liable in equity for breach of other, unwritten obligations concerning the exact same subject. And if North Carolina did breach the Compact, then plaintiffs have a remedy at law for whatever damages they suffered as a result of that breach, and no separate equitable claim for those or other damages will lie. North Carolina's motion for summary judgment on Counts III-V should be granted.

CONCLUSION

The Exceptions of the State of North Carolina to the Preliminary Report and the Second Report of the Special Master should be sustained. North Carolina's motions to dismiss all claims brought by the Southeast Interstate Low-Level Radioactive Waste Management Commission and for summary judgment as to Counts III, IV, and V of the Bill of Complaint should be granted.

Respectfully submitted,

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June 2009

APPENDIX

Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act
Pub. L. No. 99-240, Title II,
99 Stat. 1871 (1986) as amended by
Southeast Interstate Low-Level Radioactive Waste Compact Amendments Consent Act of 1989, Pub. L. No. 101-171,
103 Stat. 1289 (1989) 1a

Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act.
Pub. L. No. 99-240, Title II, 99 Stat. 1871 (1986)
as amended by 103 Stat. 1289 (1989)

SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMPACT

ARTICLE 1
POLICY AND PURPOSE

There is hereby created the Southeast Interstate Low-Level Radioactive Waste Management Compact. The party States recognize and declare that each state is responsible for providing for the availability of capacity either within or outside the state for disposal of low-level radioactive waste generated within its borders, except for waste generated as a result of defense activities of the federal government or federal research and development activities. They also recognize that the management of low-level radioactive waste is handled most efficiently on a regional basis. The party states further recognize that the Congress of the United States, by enacting the Low-Level Radioactive Waste Policy Act (Public Law 96-573), has provided for and encouraged the development of low-level radioactive waste compacts as a tool for disposal of such waste. The party states recognize that the safe and efficient management of low-level radioactive waste generated within the region requires that

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as amended by 103 Stat. 1289 (1989)

sufficient capacity to dispose of such waste be properly provided.

It is the policy of the party states to: enter into a regional low-level radioactive waste management compact for the purpose of providing the instrument and framework for a cooperative effort; provide sufficient facilities for the proper management of low-level radioactive waste generated in the region; promote the health and safety of the region; limit the number of facilities required to effectively and efficiently manage low-level radioactive waste generated in the region; encourage the reduction of the amounts of low-level waste generated in the region; distribute the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states, and ensure the ecological management of low-level radioactive wastes.

Implicit in the congressional consent to this compact is the expectation by Congress and the party states that the appropriate federal agencies will actively assist the Compact Commission and the individual party states to this compact by:

1. expeditious enforcement of federal rules, regulations and laws;

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2. imposing sanctions against those found to be in violation of federal rules, regulations and laws;

3. timely inspection of their licensees to determine their capability to adhere to such rules, regulations and laws;

4. timely provision of technical assistance to this compact in carrying out their obligations under the Low-Level Radioactive Waste Policy Act, as amended.

ARTICLE 2
DEFINITIONS

As used in this compact, unless the context clearly requires a different construction:

1. "Commission" or "Compact Commission" means the Southeast Interstate Low-Level Radioactive Waste Management Commission.

2. "Facility" means a parcel of land, together with the structure, equipment and improvements thereon or appurtenant thereto, which is used or is being developed for the treatment, storage or disposal of low-level radioactive waste.

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as amended by 103 Stat. 1289 (1989)

3. "Generator" means any person who produces or possesses low-level radioactive waste in the course of or as an incident to manufacturing, power generation, processing, medical diagnosis and treatment, research, or other industrial or commercial activity. This does not include persons who provide a service to generators by arranging for the collection, transportation, storage or disposal of wastes with respect to such waste generated outside the region.

4. "High-level waste" means irradiated reactor fuel, liquid wastes from reprocessing irradiated reactor fuel, and solids into which such liquid wastes have been converted, and other high-level radioactive waste as defined by the U.S. Nuclear Regulatory Commission.

5. "Host state" means any state in which a regional facility is situated or is being developed.

6. "Low-level radioactive waste" or "waste" means radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or by-product material as defined in section 11e, (2) of the Atomic Energy Act of 1954, or as may be further defined by Federal law or regulation.

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7. "Party state" means any state which is a signatory party to this compact.

8. "Person" means any individual, corporation, business enterprise, or other legal entity (either public or private).

9. "Region" means the collective party states.

10. "Regional facility" means (1) a facility as defined in this article which has been designated, authorized, accepted or approved by the Commission to receive waste or (2) the disposal facility in Barnwell County, South Carolina, owned by the State of South Carolina and as licensed for the burial of low-level radioactive waste on July 1, 1982, but in no event shall this disposal facility serve as a regional facility beyond December 31, 1992.

11. "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands or any other territorial possession of the United States.

12. "Transuranic wastes" means waste material containing transuranic elements with contamination levels as determined by the regulations of (1) the U.S.

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Nuclear Regulatory Commission or (2) any host state, if it is an agreement state under section 274 of the Atomic Energy Act of 1954.

13. "Waste management" means the storage, treatment, or disposal of waste.

ARTICLE 3
RIGHTS AND OBLIGATIONS

The rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and nothing in this compact shall be construed to infringe upon, limit or abridge those rights.

(A) Subject to any license issued by the U.S. Nuclear Regulatory Commission or a host state, each party state shall have the right to have all wastes generated within the borders stored, treated, or disposed of, as applicable, at regional facilities and, additionally, shall have the right of access to facilities made available to the region through agreements entered into by the Commission pursuant to article 4(E)9. The right of access by a generator within a party state to any regional facility is limited by its adherence to applicable state and federal law and regulation.

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(B) If no operating regional facility is located within the borders of a party state and the waste generated within its borders must therefore be stored, treated, or disposed of at a regional facility in another party state, the party state without such facilities may be required by the host state or states to establish a mechanism which provides compensation for access to the regional facility according to terms and conditions established by the host state or states and approved by a two-thirds vote of the Commission.

(C) Each party state must establish the capability to regulate, license, and ensure the maintenance and extended care of any facility within its borders. Host states are responsible for the availability, the subsequent post-closure observation and maintenance, and the extended institutional control of their regional facilities in accordance with the provisions of Article 5, section (B).

(D) Each party state must establish the capability to enforce any applicable federal or state laws and regulations pertaining to the packaging and transportation of waste generated within or passing through its borders.

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(E) Each party state must provide to the Commission on an annual basis any data and information necessary to the implementation of the Commission's responsibilities. Each party state shall establish the capability to obtain any data and information necessary to meet its obligation.

(F) Each party state must, to the extent authorized by federal law, require generators within its borders to use the best available waste management technologies and practices to minimize the volumes of waste requiring disposal.

ARTICLE 4
THE COMMISSION

(A) There is hereby created the Southeast Interstate Low-Level Radioactive Waste Management Commission, ("Commission" or "Compact Commission"). The Commission shall consist of two voting members from each party state to be appointed according to the laws of each state. The appointing authorities of each state must notify the Commission in writing of the identity of its members and any alternates. An alternate may act on behalf of the member only in the member's absence.

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(B) Each commission member is entitled to one vote. No action of the Commission shall be binding unless a majority of the total membership cast their vote in the affirmative, or unless a greater than majority vote is specifically required by any other provision of this compact.

(C) The Commission must elect from among its members a presiding officer. The Commission shall adopt and publish, in convenient form, by-laws which are consistent with this compact.

(D) The Commission must meet at least once a year and also meet upon the call of the presiding officer, by petition of a majority of the party states, or upon the call of a host state. All meetings of the Commission must be open to the public.

(E) The Commission has the following duties and powers:

1. To receive and approve the application of a nonparty state to become an eligible state in accordance with the provisions of Article 7(B).

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2. To receive and approve the application of a nonparty state to become an eligible state in accordance with the provisions of Article 7(C).

3. To submit an annual report and other communications to the Governors and to the presiding officer of each body of the legislature of the party states regarding the activities of the Commission.

4. To develop and use procedures for determining, consistent with considerations for public health and safety, the type and number of regional facilities which are presently necessary and which are projected to be necessary to manage waste generated within the region.

5. To provide the party states with reference guidelines for establishing the criteria and procedures for evaluating alternative locations for emergency or permanent regional facilities.

6. To develop and adopt, within one year after the Commission is constituted as provided for in Article 7(D) procedures and criteria for identifying a party state as a host state for a regional facility as determined pursuant to the requirements of this article. In accordance with these procedures and

criteria, the Commission shall identify a host state for the development of a second regional disposal facility within three years after the Commission is constituted as provided for in Article 7(D), and shall seek to ensure that such facility is licensed and ready to operate as soon as required but in no event later than 1991.

In developing criteria, the Commission must consider the following; the health, safety, and welfare of the citizens of the party states; the existence of regional facilities within each party state; the minimization of waste transportation; the volumes and types of wastes generated within each party state; and the environmental, economic, and ecological impacts on the air, land, and water resources of the party states.

The Commission shall conduct such hearings, require such reports, studies, evidence, and testimony; and do what is required by its approved procedures in order to identify a party state as a host state for a needed facility.

7. In accordance with the procedures and criteria developed pursuant to Section (E)(6) of this Article, to designate, by a two-thirds vote, a host state for the establishment of a needed regional facility. The

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Commission shall not exercise this authority unless the party states have failed to voluntarily pursue the development of such facility. The Commission shall have the authority to revoke the membership of a party state that willfully creates barriers to the siting of a needed regional facility.

8. To require of and obtain from party states, eligible states seeking to become party states, and non-party states seeking to become eligible states, data and information necessary to the implementation of Commission responsibilities.

9. Notwithstanding any other provision of this compact, to enter into agreements with any person, state, or similar regional body or group of states for the importation of waste into the region and for the right of access to facilities outside the region for waste generated within the region. The authorization to import requires a two-thirds majority vote of the Commission, including an affirmative vote of both representatives of the host state in which any affected regional facility is located. This shall be done only after an assessment of the affected facility's capability to handle such wastes.

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10. To act or appear on behalf of any party state or states, only upon written request of both members of the Commission for such state or states as an intervenor or party in interest before Congress, state legislatures, any court of law, or any federal, state, or local agency, board, or commission which has jurisdiction over the management of wastes. The authority to act, intervene, or otherwise appear shall be exercised by the Commission, only after approval by a majority vote of the Commission.

11. To revoke the membership of a party state in accordance with Article 7(F).

(F) The Commission may establish any advisory committees as it deems necessary for the purpose of advising the Commission on any matters pertaining to the management of low-level radioactive waste.

(G) The Commission may appoint or contract for and compensate such limited staff necessary to carry out its duties and functions. The staff shall serve at the Commission's pleasure irrespective of the civil service, personnel, or other merit laws of any of the party states or the federal government and shall be compensated from funds of the Commission. In selecting any staff, the Commission shall assure that

the staff has adequate experience and formal training to carry out such functions as may be assigned to it by the Commission. If the Commission has a headquarters it shall be in a party state.

(H) Funding for the Commission must be provided as follows:

1. Each eligible state, upon becoming a party state, shall pay twenty-five thousand dollars to the Commission which shall be used for costs of the Commission's services.

2. Each state hosting a regional disposal facility shall annually levy special fees or surcharges on all users of such facility, based upon the volume of wastes disposed of at such facilities, the total of which:

a. must be sufficient to cover the annual budget of the Commission;

b. must represent the financial commitments of all party states to the Commission;

c. must be paid to the Commission;

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Provided, however, That each host state collecting such fees or surcharges may retain a portion of the collection sufficient to cover its administrative costs of collection and that the remainder be sufficient only to cover the approved annual budgets of the Commission.

3. The Commission must set and approve its first annual budget as soon as practicable after its initial meeting. Host states for disposal facilities must begin imposition of the special fees and surcharges provided for in this section as soon as practicable after becoming party states and must remit to the Commission funds resulting from collection of such special fees and surcharges within sixty days of their receipt.

(I) The Commission must keep accurate accounts of all receipts and disbursements. An independent certified public accountant shall annually audit all receipts and disbursements of Commission funds and submit an audit report to the Commission. The audit report shall be made a part of the annual report of the Commission required by Article 4(E)3.

(J) The Commission may accept for any of its purposes and functions any and all donations, grants of money, equipment, supplies, materials, and services (conditional or otherwise) from any state, or the

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United States, or any subdivision or agency thereof, or interstate agency, or from any institution, person, firm, or corporation, and may receive, utilize, and dispose of the same. The nature, amount, and condition, if any, attendant upon any donation or grant accepted pursuant to this section, together with the identity of the donor, grantor, or lender shall be detailed in the annual report of the Commission.

(K) The Commission is not responsible for any costs associated with:

1. the creation of any facility,

2. the operation of any facility,

3. the stabilization and closure of any facility,

4. the post-closure observation, and maintenance of any facility, or

5. the extended institutional control, after post-closure observation and maintenance of any facility.

(L) As of January 1, 1986, the management of wastes at regional facilities is restricted to wastes generated within the region, and to wastes generated

within non-party states when authorized by the Commission pursuant to the provisions of this compact. After January 1, 1986, the Commission may prohibit the exportation of waste from the region for the purposes of management.

(M)

1. The Commission herein established is a legal entity separate and distinct from the party states capable of acting in its own behalf and is liable for its actions. Liabilities of the Commission shall not be deemed liabilities of the party states. Members of the Commission shall not personally be liable for action taken by them in their official capacity.

2. Except as specifically provided in this compact, nothing in this compact shall be construed to alter the incidence of liability of any kind for any act, omission, course of conduct, or on account of any causal or other relationships. Generators and transporters of wastes and owners and operators of sites shall be liable for their acts, omissions, conduct, or relationships in accordance with all laws relating thereto.

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ARTICLE 5

DEVELOPMENT AND OPERATION OF FACILITIES

(A) Any party state which becomes a host state in which a regional facility is operated shall not be designated by the Compact Commission as a host state for an additional regional facility until each party state has fulfilled its obligation, as determined by the Commission, to have a regional facility operated within its borders.

(B) A host state desiring to close a regional facility located within its borders may do so only after notifying the Commission in writing of its intention to do so and the reasons therefor. Such notification shall be given to the Commission at least four years prior to the intended date of closure. Notwithstanding the four year notice requirement herein provided, a host state is not prevented from closing its facility or establishing conditions of its use and operations as necessary for the protection of the health and safety of its citizens. A host state may terminate or limit access to its regional facility if it determines that Congress has materially altered the conditions of this compact.

(C) Each party state designated as a host state for a regional facility shall take appropriate steps to ensure

that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority.

(D) No party state shall have any form of arbitrary prohibition on the treatment, storage or disposal of low-level radioactive waste within its borders.

(E) No party state shall be required to operate a regional facility for longer than a 20-year period, or to dispose of more than 32,000,000 cubic feet of low-level radioactive waste, whichever first occurs.

ARTICLE 6
OTHER LAWS AND REGULATIONS

(A) Nothing in this compact shall be construed to:

1. Abrogate or limit the applicability of any act of Congress or diminish or otherwise impair the jurisdiction of any federal agency expressly conferred thereon by the Congress.

2. Abrogate or limit the regulatory responsibility and authority of the U.S. Nuclear Regulatory Commission or of an agreement state under Section

274 of the Atomic Energy Act of 1954 in which a regional facility is located.

3. Make inapplicable to any person or circumstance any other law of a party state which is not inconsistent with this compact.

4. Make unlawful the continued development and operation of any facility already licensed for development or operation on the date this compact becomes effective, except that any such facility shall comply with Article 3, Article 4 and Article 5 and shall be subject to any action lawfully taken pursuant thereto.

5. Prohibit any storage or treatment of waste by the generator on its own premises.

6. Affect any judicial or administrative proceeding pending on the effective date of this compact.

7. Alter the relations between, and the respective internal responsibilities of, the government of a party state and its subdivisions.

8. Affect the generation, treatment, storage or disposal of waste generated by the atomic energy

defense activities of the Secretary of the United States Department of Energy or federal research and development activities as defined in Public Law 96-573.

9. Affect the rights and powers of any party state and its political subdivisions to regulate and license any facility within its borders or to affect the rights and powers of any party state and its political subdivisions to tax or impose fees on the waste managed at any facility within its borders.

(B) No party state shall pass any law or adopt any regulation which is inconsistent with this compact. To do so may jeopardize the membership status of the party state.

(C) Upon formation of the compact no law or regulation of a party state or of any subdivision or instrumentality thereof may be applied so as to restrict or make more inconvenient access to any regional facility by the generators of another party state than for the generators of the state where the facility is situated.

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(D) Restrictions of waste management of regional facilities pursuant to Article 4 shall be enforceable as a matter of state law.

ARTICLE 7

ELIGIBLE PARTIES; WITHDRAWAL; REVOCATION; ENTRY INTO FORCE; TERMINATION

(A) This compact shall have as initially eligible parties the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.

(B) Any state not expressly declared eligible to become a party state to this compact in Section (A) of this Article may petition the Commission, once constituted, to be declared eligible. The Commission may establish such conditions as it deems necessary and appropriate to be met by a state wishing to become eligible to become a party state to this compact pursuant to such provisions of this section. Upon satisfactorily meeting the conditions and upon the affirmative vote of two-thirds of the Commission, including the affirmative vote of both representatives of a host state in which any affected regional facility is located, the petitioning state shall be eligible to become a party state to this compact and may become

a party state in the same manner as those states declared eligible in Section (A) of this Article.

(C) Each state eligible to become a party state to this compact shall be declared a party state upon enactment of this compact into law by the state and upon payment of the fees required by Article 4(H)(1). The Commission is the judge of the qualifications of the party states and of its members and of their compliance with the conditions and requirements of this compact and the laws of the party states relating to the enactment of this compact.

(D)

1. The first three states eligible to become party states to this compact which enact this compact into law and appropriate the fees required by Article 4(H)1 shall immediately, upon the appointment of their Commission members, constitute themselves as the Southeast Low-Level Radioactive Waste Management Commission; shall cause legislation to be introduced in the Congress which grants the consent of the Congress to this compact; and shall do those things necessary to organize the commission and implement the provisions of this compact.

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2. All succeeding states eligible to become party states to this compact shall be declared party states pursuant to the provisions of Section (C) of this Article.

3. The consent of the Congress shall be required for full implementation of this compact. The provisions of Article 5 Section (D) shall not become effective until the effective date of the import ban authorized by Article 4, Section (L) as approved by Congress. The Congress may by law withdraw its consent only every five years.

(E) No state which holds membership in any other regional compact for the management of low-level radioactive waste may be considered by the Compact Commission for eligible state status or party state status.

(F) Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state. Any sanction shall be imposed only upon the affirmative vote of at least two-thirds of the Commission members. Revocation of party state status may take effect on the

date of the meeting at which the Commission approves the resolution imposing such sanction, but in no event shall revocation take effect later than ninety days from the date of such meeting. Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction.

The Commission must, as soon as practicable after the meeting at which a resolution revoking status as a party state is approved, provide written notice of the action, along with a copy of the resolution to the Governors, the Presidents of the Senates, and the Speakers of the Houses of Representatives of the party states, as well as chairmen of the appropriate committees of the Congress.

(G) Subject to the provisions of Article 7 Section (H), any party state may withdraw from the compact by enacting a law repealing the compact, provided that if a regional facility is located within such state, such regional facility shall remain available to the region for four years after the date the Commission receives verification in writing from the Governor of such party state of the rescission of the Compact. The Commission, upon receipt of the verification, shall as

soon as practicable provide copies of such verification to the Governor, the Presidents of the Senates, and the Speakers of the Houses of Representatives of the party states as well as the chairmen of the appropriate committees of the Congress.

(H) The right of a party state to withdraw pursuant to section (G) shall terminate thirty days following the commencement of operation of the second host state disposal facility. Thereafter a party state may withdraw only with the unanimous approval of the Commission and with the consent of Congress. For purposes of this section, the low-level radioactive waste disposal facility located in Barnwell County, South Carolina shall be considered the first host state disposal facility.

(I) This compact may be terminated only by the affirmative action of the Congress or by rescission of all laws enacting the compact in each party state.

ARTICLE 8
PENALTIES

(A) Each party state, consistently with its own law, shall prescribe and enforce penalties against any

person not an official of another state for violation of any provisions of this compact.

(B) Each party state acknowledges that the receipt by a host state of waste packaged or transported in violation of applicable laws and regulations can result in the imposition of sanctions by the host state which may include suspension or revocation of the violator's right of access to the facility in the host state.

ARTICLE 9
SEVERABILITY AND CONSTRUCTION

The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared by a court of competent jurisdiction to be contrary to the Constitution of any participating state or of the United States, or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any other government, agency, person, or circumstance shall not be affected thereby. If any provision of this compact shall be held contrary to the Constitution of any State participating therein, the compact shall remain in full force and effect as to the state affected as to all severable matters. The

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provisions of this compact shall be liberally construed to give effect to the purposes thereof.